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APR 24 1944

United States of America

In the

Supreme Court of the United States

No. 926

UNITED STATES OF AMERICA
ex rel. LOUIS JACOBS,
Petitioner,
vs.
JOHN J. BARC, United States Marshal for the
Eastern District of Michigan,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PAUL B. MAYRAND,
Attorney for Petitioner,
3729 Barlum Tower,
Detroit 26, Michigan.

DANIEL P. O'BRIEN,
Of Counsel for Petitioner,
3729 Barlum Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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To the Honorable The Supreme Court of the United States:

The petition of Louis Jacobs respectfully shows to this Honorable Court:

STATEMENT OF MATTER

1. The petitioner was convicted of counterfeiting on November 9, 1933 and was sentenced to a term of six years imprisonment by the United States District Court for the

Eastern District of Michigan, Southern Division. In the penitentiary he earned 576 days of statutory good time by virtue of Title 18 U. S. C., Section 710, *post*, and 160 days industrial good time by virtue of Title 18 U. S. C., Section 744h, *post*, and thereby was released November 2, 1937 under a certificate of conditional release (R. 10). On or about July 8, 1939, he was arrested for armed robbery but was acquitted thereof in the Recorder's Court for the City of Detroit. He was rearrested under the same set of facts on January 3, 1940 for carrying concealed weapons and was convicted thereof in the Recorder's Court of Detroit and was sentenced on April 2, 1940 to the State Penitentiary at Jackson, Michigan for a term of two and a half to four years. He was released on parole to the State of Michigan on June 3, 1943.

2. The six year term did not expire until November 8, 1939, according to the United States Board of Parole, but, according to your petitioner and a proper interpretation of the statutes it expired forever on November 2, 1937.

3. The United States Board of Parole, on November 7, 1939, issued its parole violation warrant for the retaking of the petitioner as a violator of his conditional release charging the petitioner with making false reports, associating with persons of bad reputation, and alleged armed robbery (R. 22).

4. Said warrant was delivered to the United States Marshal, for the Eastern District of Michigan, on November 13, 1939 and was not served upon petitioner until June 3, 1943, upon his release from the State Penitentiary at Jackson, Michigan (R. 23).

5. Petitioner obtained a Writ of Habeas Corpus in the United States District Court on the 4th day of June, A. D. 1943, upon a petition claiming, *inter alia*, that his sentence

terminated forever upon his release November 2, 1937, and that the power of the United States Board of Parole over him expired on said date; and that its warrant for his retaking was thereby null and void and of no force and effect; and that his detention was in violation of the due process clause of the Fifth Amendment. Said writ was dismissed on July 1, 1943 by the United States District Court (R. 18).

6. Your petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and the appeal was heard on February 21, 1944 and on the 27th day of March, A. D. 1944 said appellate court handed down an opinion affirming the judgment of the District Court for the Eastern District of Michigan, Southern Division.

OPINION BELOW

The opinion of the Circuit Court of Appeals is not yet officially reported (R. 30).

JURISDICTIONAL STATEMENT

(a) Constitutional Provision, Statutes and Rules Involved.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals for the Sixth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for review and determination in conformity with the provisions of Title 28 U. S. C. Section 347 (a) and Section 463 (a) and (c) of Title 28 U. S. C. which allows the filing of a petition for certiorari in *habeas corpus* cases; and also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

The Fifth Amendment in pertinent part provides as follows: "No person shall * * * deprived of life, liberty, or property, without due process of law * * *."

The federal statutes involved are Sections 710, 710 a and 744h of Title 18, U. S. C., the pertinent parts of which set forth as follows, respectively:

> "§710 Deductions from sentences for good conduct; computation. Each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated. (June 21, 1902, c. 1140 § 1, 32 Stat. 397.)"
>
> "§ 710a. SAME: PRISONERS SENTENCED ON OR AFTER JULY 29, 1932. With respect to Federal prisoners sentenced on and after July 29, 1932, deductions from the term of sentence for good conduct, as provided for by section 710 of this title, shall be computed beginning with the day on which the sentence commences to run. (June 29, 1932, c. 310 § 2, 47 Stat. 381.)

"§ 744h. SAME: COMMUTATION OF SENTENCE FOR GOOD CONDUCT. Sections 710 to 712, inclusive, of this title, providing for commutation of sentences of United States prisoners for good conduct, shall be applicable to prisoners engaged in any industry, or transferred to any camp established under authority of section 744b and 744c of this title; and in addition thereto each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed, under the same terms and conditions as provided in sections 710 to 712, inclusive, a deduction from his sentence of not to exceed three days for each month of actual employment in said industry or said camp for the first year or any part thereof, and for any succeeding year or any part thereof not to exceed five days for each month of actual employment in said industry or said camp. (May 27, 1930, c. 340, § 8, 46 Stat. 392,)"

and also Section 714, Title 18, U. S. C., as follows:

"§ 714. PAROLE OF PRISONERS: CONDITIONS. Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States Penitentiary, or prison, for a definite term of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (June 25, 1910, c. 387, § 1, 36 Stat. 819; Jan. 23, 1913. c. 9, 37 Stat. 650.)";

and also the pertinent part of Section 716, Title 18, U. S. C., as follows:

> "§ 716. SAME: GRANTING OF PAROLE: APPLICATION; FINDINGS; TERMS AND CONDITIONS; APPROVAL OF ATTORNEY GENERAL; PAROLE OF ALIEN PRISONERS.
>
> If it shall appear to the Board of Parole from a report from the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms, and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law * * *." (June 25, 1910, c. 387, § 3, 36 Stat. 819; May 13, 1930, c. 255, § 1, 46 Stat. 272; Mar. 2, 1931, c. 371, 46 Stat. 1469.)"

and 716a, Title 18 U. S. C., as follows:

> "§ 716a. SAME: CONTINUANCE OF PAROLE UNTIL EXPIRATION OF MAXIMUM SENTENCE WITHOUT DEDUCTIONS. Any prisoner sentenced after June 29, 1932, who may be paroled under authority of the parole laws, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law. (June 29, 1932, c. 310, § 3, 47 Stat. 381.)"

and also 716b, Title 18 U. S. C., as follows:

> "§ 716b. SAME: PRISONERS RELEASED WITH CREDIT FOR GOOD CONDUCT treated as on parole until expiration of maximum term. Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence: PROVIDED, That this section shall not operate to present delivery of a prisoner to the authorities of any State otherwise entitled to his custody. (June 29, 1932, c. 310, § 4, 47 Stat. 381.)"

and also 723, Title 18, U. S. C., as follows:

> "§ 723. SAME: POWER OF PRESIDENT TO GRANT PARDON OR COMMUTATION, OR GOOD TIME ALLOWANCE NOT IMPAIRED. Nothing in sections 714 to 722 of this title shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by law. (June 25, 1910, c. 387, § 10, 36 Stat. 821.)"

(b) Statement Particularly Disclosing Jurisdiction

The power of the United States Board of Parole, an agency of the United States, is directly involved in this petition. Without positive enactment by the Congress and, therefore, beyond its power to act legally, the Parole Board seeks to deprive petitioner of his liberty without due process of law. Petitioner was released on the so-called conditional release (R. 10).

Petitioner did not make a parole under Section 714, Title 18, *supra,* so that he does not fall within Sections 716, 716a, and 716b, Title 18, inasmuch as petitioner was released under Section 710, Title 18, *supra,* and the Parole Board has no authority or power to retake him, and its Parole Violation Warrant is null and void against his just rights and should be so declared (R. 22). Petitioner was not on parole; a conditional release is a device evolved by the Parole Board nowhere authorized by any Act of Congress, so that the Supreme Court has squarely before it the question of construction of the foregoing federal statutes to determine whether or not the Parole Board has the power to act as it seeks to act in this case and thereby recall petitioner to the penitentiary.

Petitioner respectfully submits that the appellate court has erroneously decided an important question of federal law which has not been but should be settled by this court in accordance with 5 (b) of Rule 38 of the Supreme Court Rules. Petitioner respectfully submits that the decision of this court in *Zerbst v. Kidwell,* 304 U. S. 359, 82 L. Ed. 1399, 58 S. Ct. 872, 116 A. L. R. 808, is not controlling herein and that footnote number 1 in said decision does not make the law in this case, and that the precise point presented herein has never been decided by this honorable court; and that to deprive petitioner of his liberty under an erroneous decision of the appellate court would be an act against the just rights of the petitioner and contrary to the due process clause of the 5th Amendment, *supra.*

QUESTION PRESENTED

Does petitioner fall within the provisions of Section 716a and 716b, Title 18, U. S. C., when not paroled under Sections 714 and 716, Title 18, U. S. C., so as to grant the Parole Board power to retake him without violating the due process clause of the Fifth Amendment, when petitioner is actually released under the authority of Sections 710 and 744h, Title 18, U. S. C., *supra.*

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the petitioner having been released under the provisions of Sections 710 and 744h, Title 18 U. S. C., is under the provisions of Sections 716a and 716b, Title 18, U. S. C., and consequently invalidating the plain meaning of Sections 710 and 744h in violation of the due process clause of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals erroneously assumes that the petitioner received a parole by virtue of Sections 714 and 716 U. S. C., Title 18, whereby he would have been released after serving one-third of the term of his sentence, and thereby petitioner would admittedly have been under the provisions of Sections 716a and 716b of Title 18, U. S. C. However, as a matter of fact, petitioner was released under and by virtue of the terms of Sections 710 and 710a and 744h, Title 18, U. S. C., and thereby does not come within the provisions of 716a and 716b, as petitioner was not released on parole. His sentence expired forever on November 2, 1937 and not on November 8, 1939, as the Parole Board erroneously contends.

The precise question presented herein has not been decided by this honorable court. With all due respect to *Zerbst v. Kidwell,* 92 Fed. (2d) 756 (C. C. A. 5), affirmed 304 U. S. 359, 82 L. Ed. 1399, 58 S. Ct. 872, 116 A. L. R. 808, *Story v. Rives,* 97 Fed. (2d) 182 (C. A. D. C.), cert. denied 305 U. S. 595, *King v. U. S.,* 98 Fed. (2d) 291 (C. A. D. C.), *Briggs v. Huff,* 118 Fed. (2d) 1006 (C. C. A. 4), and *United States ex rel Michelson v. Dillard,* 102 Fed. (2d) 94 (C. C. A. 4), the exact question presented herein was not the main question in the above cases.

The United States has not changed or amended Section 710, Title 18 U. S. C., enacted June 21, 1902, and that the United States had no intention so to do is clearly indicated by the enactment of Section 710a of Title 18, U. S. C., which reaffirms the absolute deduction from the term of the sentence proposition advanced herein, and which was enacted June 29, 1932, on the same day of the enactment of Sections 716a and 716b, Title 18 U. S. C., so that it can scarcely be argued that the Congress thereby intended to change the meaning of Section 710 of Title 18 U. S. C., when it did not so do.

It is apparent from the large number of cases decided upon this subject in the circuit courts of appeal that there is not unanimity of decision therein, that the question is a serious one that needs decision and clarification by this honorable court, that the circuit courts of appeal are not in accord thereon, and that the Circuit Court of Appeals for the Sixth Circuit erred in its decision in this case. As to conflict of decisions see *Clark v. Suprenant* (C. C. A. 9), 94 Fed. (2d) 969 and *Douglas v. King* (C. C. A. 8), 110 Fed. (2d) 911 in favor of petitioner, and *King v. United States,* 98 Fed. (2d) 291 (C. A. D. C.) and *Briggs v. Huff,* 118 Fed. (2d) 1006 (C. C. A. 4) against the theory of petitioner herein. Therefore, there is a conflict of decision

upon a very important question of federal law which should be decided by this honorable court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

PAUL B. MAYRAND,
Attorney for Petitioner,
3729 Barlum Tower,
Detroit 26, Michigan.

DANIEL P. O'BRIEN,
Of Counsel,
3729 Barlum Tower,
Detroit 26, Michigan.

Dated: Detroit, Michigan,
April 17, 1944.

United States of America

In the

Supreme Court of the United States

No.....

UNITED STATES OF AMERICA
ex rel. LOUIS JACOBS,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 30) is not yet reported.

CONCISE JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction of this case because of 28 U. S. C. Section 347 (a) and 28 U. S. C. Section 463 (a) and (c) and also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on

May 7, 1934. An interpretation of 18 U. S. C. Sections 710, 710a, 744h, 714, 716, 716a, 716b and 723, which are set out verbatim in the Petition filed herewith, is involved in this case as well as the due process clause of the Fifth Amendment to the Constitution of the United States.

This is a *habeas corpus* proceeding upon behalf of the petitioner herein directed against the United States Board of Parole, an agency of the United States, which seeks to deprive the petitioner of his liberty without due process of law contrary to said Fifth Amendment and contrary to the foregoing statutes, and as such is appealable to the Supreme Court from the Circuit Court of Appeals under 28 U. S. C. Section 463 (a) and (c) which sets forth as follows:

> "REVIEW—(a) BY CIRCUIT COURT OF APPEALS: JURISDICTION OF CIRCUIT JUDGE TO ISSUE WRIT. In a proceeding in *habeas corpus* in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had.
>
> • • • • •
>
> "(c) SECTIONS 346 and 347 OF THIS TITLE APPLICABLE. Sections 346 and 347 of this title shall apply to *habeas corpus* cases in the circuit courts of appeals and in the United States Court of Appeals for the District of Columbia as to other cases therein."

and which said Sections allow certiorari to this Court under 28 U. S. C. Section 347 (a). Therefore, it is respectfully submitted by petitioner that the Supreme Court has jurisdiction of this case upon petition for writ of certiorari, and because of the importance of the question to the Government should be reviewed by this honorable court.

CONCISE STATEMENT OF THE CASE

Petitioner was originally sentenced by the United States District Court for the Eastern District of Michigan to a term of 6 years on November 9, 1933, and by virtue of Title 18 U. S. C. Sections 710 and 744h was released from the penitentiary on November 2, 1937 under a conditional release (R. 10). On July 8, 1939, petitioner was arrested for robbery armed in Detroit, Michigan, was acquitted thereof, was rearrested under the same set of facts January 3, 1940, for carrying concealed weapons and was convicted and sentenced therefor on April 2, 1940, to a term of 2½ to 4 years in the state penitentiary at Jackson, Michigan. On June 3, 1943 petitioner was released from said penitentiary and was taken into custody by the United States Marshal for the Eastern District of Michigan upon a parole violation warrant of the United States Board of Parole (R. 22-23) executed November 7, 1939, and delivered to the United States Marshal November 13, 1939 (R. 23).

On June 4, 1943 petitioner filed a petition in the United States District Court for a writ of *habeas corpus* (R. 1, 23) claiming his arrest under the Parole Violation Warrant (R. 22) was illegal and unconstitutional in violation of the rights guaranteed to him by the Fifth Amendment to the Constitution (R. 3), and claiming that his sentence expired forever on November 2, 1937 and not on November 8, 1939 as contended by the government (R. 23). A writ of habeas corpus was granted on June 4, 1943 (R. 5) and dismissed on July 1, 1943 (R. 17) after the District Court entered its opinion on June 25, 1943 (R. 13-17). An appeal was taken to the Circuit Court of Appeals for the Sixth Circuit and it erroneously affirmed the decision of the lower court (R. 29-33).

It is respectfully submitted that the federal statutes involved herein are set out verbatim in the petition for the writ of certiorari, *supra,* and as they are lengthy will not be repeated in the brief. Bluntly stated this honorable court has to determine whether Sections 716a and 716b Title 18 U. S. C. overrule the plain meaning of Sections 710, 710a and 744h, Title 18, U. S. C., which provide for an absolute deduction from the term of petitioner's sentence, so as to give the Parole Board jurisdiction over petitioner until November 8, 1939, or only until November 2, 1937, as claimed by petitioner (R. 3).

SPECIFICATION OF ERROR TO BE URGED

1. That the circuit court of appeals for the Sixth Circuit erred in holding that the petitioner having been released under the provisions of Section 710 and 744h, Title 18 U. S. C. is under the provisions of Sections 716a and 716b, Title 18 U. S. C. and consequently invalidating the plain meaning of Sections 710 and 744h in violation of the due process clause of the Fifth Amendment.

ARGUMENT

(a) Summary

If the sentence of the petitioner expired November 2, 1937, as contended herein, the Certificate of Conditional Release issued against him is null and void and of no force and effect whatsoever against his rights and liberty, and the warrant issued by the Parole Board on November 7, 1939, is void and of no force and effect against the liberty of petitioner. There is no federal statute authorizing the Certificate of Conditional Release; it is just another device originated without congressional authority therefor by a federal bureau that again whittles

away the liberties of the people and especially this petitioner. *The paramount principle to keep in mind here is that there is no ascertainable statutory authority for the device.*

No doubt the United States and the United States Board of Parole have the power under proper statutes and other proper conditions to release a man under parole for a certain definite time, but where, as here, a man has served his maximum sentence, less his mandatory statutory good time, the statutes of the United States do not provide for any parole or any Conditional Release and therefore, the appellant must be discharged on his petition for a Writ of *Habeas Corpus.*

The parole statutes (Title 18, Sections 714, 716, 716a and 716b) upon which the government relies to retake the petitioner refer to cases and paroles wherein the prisoner is released from prison after serving one-third of the sentence, and as the petitioner was not released under any of the foregoing statutes, but under Title 18 Sections 710 and 744h, the United States Board of Parole does not have any authority whatsoever to retake the petitioner, and this honorable court should so declare. There is no opinion or decision of the Supreme Court of the United States upon this question, and because of the importance of the question to the petitioner, and the importance of the question in the administration of the Federal Parole Act the petition for a writ of certiorari filed herewith should be granted.

(b) Final Argument

Title 18 Section 714 sets forth that a prisoner is eligible for parole after serving one-third of his sentence, and Section 716 thereof sets forth the method of carrying out

Section 714. Section 715 has been superseded by Section 723a and 723b of Title 18, so does not intervene between Sections 714 and 716. *Section 716a and 716b enacted on June 29, 1932* apply to prisoners who make a parole after serving one-third of their sentences, in accordance with Section 714, *supra.* The above sections must be read together. The historical note to Section 714 sets forth as follows: "This Section and Section 715 through to 723 of this Title were an Act entitled, 'AN ACT TO PAROLE UNITED STATES PRISONERS, AND FOR OTHER PURPOSES AND KNOWN AS THE PAROLE ACT.'" There is an obsolute division between the immediately foregoing statutes, and Title 18 Section 710 and Section 744h.

As a matter of fact and admittedly the petitioner was released under and by virtue of Title 18 Sections 710 and 744h. Now in reference to Section 710 it is plain that the statute provides for an absolute deduction from the term of the sentence. In part the statute says:

> "* * * Shall be entitled to a deduction from the term of his sentence to be estimated as follows * * *",

and Section 744h reiterates the same command in the following language:

> "* * * Sections 710 to 712, inclusive, of this title, providing for commutation of sentences of United States prisoners for good conduct, shall be applicable to prisoners engaged in any industry * * *; and in addition thereto each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed, under the same terms and conditions as provided in sections 710 to 712, a deduction from his sentence of not to exceed three days for each month of actual employment in said industry * * *" (May 27, 1930, c. 340, 8, 46 Stat. 392).

Accordingly under Section 710 petitioner was entitled to a deduction from the term of his sentence of eight (8) days per month, and therefore, petitioner has deducted from his sentence 576 days of statutory good time. Petitioner also earned by especially good conduct and hard laborious industry 160 days under Section 744h, and thereby had his sentence shortened so that he was released November 2, 1937 (R. 10). The United States Board of Parole cannot emasculate the full force and effect of Sections 710 and 744h without doing violent injustice to the rights of the prisoner and petitioner herein, as well as to the plain meaning of the English language. The statutes use plain language and they repeatedly use the words "deduction" and "commutation" and "from the term of the sentence."

The Government relies primarily upon Section 716b of Title 18, because it was enacted after Sections 710 and 744h, for authority to retake petitioner. The Government argues because it was enacted after the immediately foregoing statutes *that it is the law*. That would be an apparently conducive argument, and it apparently appealed to the Circuit Court of Appeals (R. 30), were it not for the fact of the enactment of Section 710a of Title 18 upon the same day as the enactment of 716b Title 18. Section 710a says:

> "SAME; PRISONERS SENTENCED ON OR AFTER JULY 29, 1932. With respect to Federal prisoners sentenced on and after July 29, 1932, deductions from the term of sentence for good conduct, as provided for by Section 710 of this title, shall be computed beginning with the day on which the sentence commences to run"

Now, obviously, Section 710a enacted the same day as Section 716b does not bolster the argument of the government, because the said statute refers to Section 710 directly and

uses the same language that the "deductions from the term of sentence for good conduct, * * * shall be computed beginning with the day on which the sentence commence to run." The same principle of law is set forth in Section 723 Title 18, which refers directly to Sections 714 to 722, as follows:

> "POWER OF PRESIDENT TO GRANT PARDON OR COMMUTATION, OR GOOD TIME ALLOWANCE NOT IMPAIRED. Nothing in Sections 714 to 722 of this title shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by law. (June 25, 1910, c. 387 10, 36 Stat. 821.)"

It is very plain from the foregoing statute that the parole laws from Section 714 through 723 Title 18 are very different from the laws (Sections 710, 710a, and 744h) regarding a reduction from the terms of the sentences, and that they have always been so construed to date hereof, and that is the main point petitioner is attempting to make herein, viz, that petitioner does not fall within the parole laws.

Good time is mandatory and must be granted. *Clark v. Suprenant*, 94 Fed. (2d) 969; *Douglas v. King*, 110 Fed. (2d) 911; *Howard v. U. S.*, 75 Fed. 986; and *Anderson v. Anderson*, 76 Fed. (2d) 375. See *Clark v. Suprenant, supra*, to the effect that the Parole Board does not regard a prisoner on a conditional release as a parolee. Petitioner was arrested by virtue of a Parole Violation Warrant and he is admittedly released according to the Parole Board under a Conditional Release (R. 10) (R. 22). In addition thereto the Board executed its Parole Violation Warrant on November 7, 1939 (the Government claims said date

is one day before the expiration of the sentence), and did not turn the said Warrant over to the Marshal until November 13, 1939, which was after the termination of the sentence, and the whole course of conduct of the Parole Board is so inconsistent, and so illegal, and so unconstitutional that the Supreme Court should not hesitate to announce the fact to the world.

Zerbst v. Kidwell, 304 U. S. 359, 82 L. ed. 1399, 58 S. Ct. 872, 116 A.L.R. 808 does not decide the issue in this case. The precise question raised herein was not the issue in said case, and the question herein was not involved in the decision of the case. The Court in deciding the question therein gratuitously assumed that all of the prisoners were on parole; there would be no argument in the instant case if petitioner were on parole when he left the penitentiary. Admittedly he was not. The footnote number 1 in the *Zerbst v. Kidwell, case, supra,* gratuitously assumes that all prisoners released with credit for good behavior, as petitioner herein, is on parole. We respectfully submit that assumption was made for the purpose of decision in the *Zerbst case, supra,* and certainly should not be made binding upon petitioner herein when apparently the question was not raised in the *Zerbst case* and thereby was not properly considered. We are not quarreling with the main tenet in the *Zerbst case* and we are willing to abide by a decision of the Supreme Court when the main question is presented and decided by it, but we respectfully submit that a footnote should not make the law when a man's liberty is at stake upon a sentence now eleven years old, nor should it be the law in any respect.

Finally, the petitioner has served his full sentence provided by law. The United States Board of Parole has no authority over him whatsoever. If the Congress decided otherwise, it has not said so in plain understandable language and this Honorable Court should not say so in

violation of the Fifth Amendment to the Constitution of the United States. Petitioner has served his entire sentence which has been automatically reduced forever on November 2, 1937, by the sections of the law in such case made and provided, to-wit: Section 710 and 744h of Title 18 U.S.C. The petitioner is entitled to a discharge upon his application for a Writ of Habeas Corpus, and this Court should so order after granting this petition for a writ of certiorari.

The petitioner not having made a parole upon termination of one third of his sentence is not under the provisions of the parole laws in such case made and provided, to-wit: Sections 714, 716, 716a and 716b of Title 18 U.S.C. Petitioner has not been under any parole since his discharge from the United States Industrial Camp, November 2, 1937. The petitioner earned every day of his good time by his excellent behavior and industry while in prison. Petitioner should not be required to reserve time that he has earned by good behavior and hard work. The United States Board of Parole denied him a parole after serving one-third of his sentence, and accordingly should be denied its alleged right to retake him after making the petitioner serve his full sentence less his mandatory good time. The United States should not be an Indian giver and should be fair.

There is a conflict of decision between the circuit courts in this matter, there is a grave question of importance in the administration of the federal good conduct and parole act to be decided here, for the government as well as for the petitioner, and the Fifth Amendment is involved as a restriction upon the power of the Federal Government. *Fox v. Ohio,* 5 How. 410, 12 L. Ed. 213.

RELIEF SOUGHT

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

PAUL B. MAYRAND,
Attorney for Petitioner,
3729 Barlum Tower,
Detroit 26, Michigan.

DANIEL P. O'BRIEN,
Of Counsel for Petitioner,
3729 Barlum Tower,
Detroit 26, Michigan.

Dated: April 17, 1944.

No. 926

In the Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA, EX REL. LOUIS JACOBS, PETITIONER

v.

JOHN J. BALL, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 30–33) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 27, 1944 (R. 29). The petition for a writ of certiorari was filed April 24, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, upon the release of a prisoner who has served the term for which he was sentenced, less good conduct deductions, the Board of Parole may impose parole conditions upon him for the remaining period of his full sentence, and, pursuant to a warrant issued during the term of the sentence upon reliable information that he has violated those conditions, retake him into custody to determine whether his conditional release should be revoked.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

On November 9, 1933, petitioner was convicted in the United States District Court for the Eastern District of Michigan on a counterfeiting charge and was sentenced to imprisonment for six years (R. 1, 13). On November 2, 1937, having earned 24 months' statutory good time and industrial credits, he was conditionally released from confinement (R. 10, 13). At the time of his release petitioner was informed of the conditions of his release and he certified that "I understand the above conditions which have been read and explained to me and under which I am being released" (R. 11–13). In August 1939, prior to the expiration of his full sentence, petitioner was arrested on a state charge of armed

robbery of which he subsequently was acquitted; on January 3, 1940, he was rearrested on a state charge of carrying concealed weapons and he was convicted and sentenced to imprisonment for an indeterminate term of from two and one-half to five years (R. 1–2, 13). In the meantime, however, the Board of Parole had been informed that petitioner had submitted false reports to his parole officer, associated with persons of bad reputation, and allegedly engaged in armed robbery, in violation of the parole conditions imposed upon him (R. 23–24). Accordingly, on November 7, 1939, prior to the expiration of the full term of petitioner's sentence, a member of the Board of Parole issued a warrant for the retaking of petitioner (R. 22). The warrant was received by respondent on November 13, 1939, and was executed by him on June 3, 1943, when petitioner was released from imprisonment under the state sentence (R. 2–3, 7–9, 23).

On June 4, 1943, petitioner filed in the United States District Court for the Eastern District of Michigan a petition for a writ of habeas corpus (R. 1–4) in which he contended that the full term of his federal sentence was completely served when he was released from imprisonment in November 1937, that the conditions of release imposed on him were therefore of no effect, and that respondent thus was without authority to retake and hold him for action by the Board of Parole. The writ

issued on June 4, 1943 (R. 5), and on June 7 respondent filed a return (R. 7–9) in which he alleged that petitioner was properly in his custody by virtue of the retaking warrant of the Board of Parole issued pursuant to its authority under Public Act No. 210, 72nd Congress (18 U. S. C. 716b, *infra,* p. 10) and that petitioner was being held pursuant to the procedure prescribed by 18 U. S. C. 719, *infra,* pp. 11–12.

On July 1, 1943, the district court entered an order dismissing the writ and remanding petitioner to respondent's custody (R. 17–18; see also R. 13–17). Upon appeal to the Circuit Court of Appeals for the Sixth Circuit the order was affirmed (R. 29–33).

ARGUMENT

Petitioner contends, in substance, that once the good time allowances granted by 18 U. S. C. 710 and 744h (*infra,* pp. 9–10) have been earned, they are irrevocable and, in effect, operate to reduce the total sentence by the amount of the earned good time allowances. Applying this doctrine to his case, he urges that since he earned two years' good time allowances, he was required to serve only four years of his six-year sentence, and that, having done so, the Government could not impose conditions on his release or recommit him for violation of those conditions (Pet. 7–8, 9–11, 22–26).

Prior to the Act of June 29, 1932, it was the view of the Government that the good time allowance statutes operated as petitioner here urges. For that reason the then Attorney General recommended a bill to Congress, which was passed as the Act of June 29, 1932, providing, *inter alia,* for the extension of the parole laws to permit parole supervision of prisoners until the termination of their maximum sentences. See House Report No. 960 and Senate Report No. 803, 72d Congress, 1st Session. Section 4 of that Act, 18 U. S. C. 716b (*infra,* p. 10), provides that a prisoner who shall have served his term, less deductions allowed for good conduct, "shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of United States prisoners" until the expiration of the maximum term specified in his sentence. As shown in the Statement (*supra,* p. 2), pursuant to the requirements of this section, petitioner was released from imprisonment subject to parole supervision.[1] Before his maximum term had expired and upon evidence that he had violated the conditions imposed upon him (R. 11–13, 23–24), a warrant was issued for his retaking for

[1] In *Zerbst* v. *Kidwell*, 304 U. S. 359, 360, this Court, in describing defendants released under circumstances identical to those under which petitioner was released, said, "Some were released with credit for good conduct but are treated as on parole until their maximum terms have expired."

further action by the Board of Parole (R. 22), in accordance with 18 U. S. C. 717 and 719 (*infra*, p. 11), and he is presently held by respondent awaiting action by the Board of Parole (R. 8–9). Plainly, since he is held pursuant to the applicable statutory commands, there is no basis for habeas corpus. *Chandler* v. *Johnston*, 133 F. (2d) 139 (C. C. A. 9); *Wipf* v. *King*, 131 F. (2d) 33 (C. C. A. 8); *Bragg* v. *Huff*, 118 F. (2d) 1006 (C. C. A. 4); *Bowers* v. *Dishong*, 103 F. (2d) 464 (C. C. A. 5); *United States ex rel. Nicholson* v. *Dillard*, 102 F. (2d) 94 (C. C. A. 4); *King* v. *United States*, 98 F. (2d) 291 (App. D. C.); *Story* v. *Rives*, 97 F. (2d) 182, 184 (App. D. C.), certiorari denied, 305 U. S. 595; *United States ex rel. Rowe* v. *Nicholson*, 78 F. (2d) 468 (C. C. A. 4), certiorari denied, 296 U. S. 573.

Petitioner urges (Pet. 24) that Section 10 of the Parole Act of June 25, 1910, 18 U. S. C. 723 (*infra*, p. 12), precludes the conclusion because it provides that nothing in the Act shall "impair or revoke such good time allowance as is or may hereafter be provided by law." This has been interpreted as meaning only that the plan of good time allowances was not superseded by the parole program. *Morgan* v. *Aderhold*, 73 F. (2d) 171 (C. C. A. 5). In any event, however, even if Section 10 is construed as petitioner

contends, it must be held to have been repealed by the Act of June 29, 1932, extending the provisions of the Parole Act to prisoners released by virtue of good conduct allowances and repealing "all laws and parts of laws in conflict herewith" (47 Stat. 381, § 5).[2]

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[2] *Clark* v. *Surprenant*, 94 F. (2d) 969 (C. C. A. 9), and *Douglas* v. *King*, 110 F. (2d) 911 (C. C. A. 8), which petitioner cites (Pet. 10–11) as being in conflict with the decisions cited *supra*, p. 6, in support of respondent's position, do not in any sense indicate a conflict of decisions or support petitioner's position. In the *Clark* case the court upheld the issuance of the writ of habeas corpus where it was shown that the petitioner was not arrested for violation of his parole conditions until long after his maximum term had expired, and that he had not in fact violated the conditions imposed upon him. In the *Douglas* case the court held that a prisoner confined in the Medical Center for Federal Prisoners was not entitled to good time allowances by virtue of 18 U. S. C. 876. The court's dictum that in respect of other prisoners a good time allowance, when earned, is a matter of right which may be invoked on habeas corpus, is applicable to the situation of a prisoner who has not been released conditionally upon completion of his sentence less his good time allowances. It has no application here. *Chandler* v. *Johnston*, *supra*.

CONCLUSION

Petitioner is properly held in custody for the action of the Board of Parole. The decision below is therefore correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

MAY 1944.

APPENDIX

R. S. §§ 5543, 5544, as amended (18 U. S. C. 710) provide:

> Each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: Upon a sentence of not less than than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated.

Section 8 of the Act of May 27, 1930, 46 Stat. 392 (18 U. S. C. 744h) provides:

> [Section 710–712 of Title 18], providing for commutation of sentences of United States prisoners for good conduct, shall be applicable to prisoners engaged in any industry, or transferred to any camp established under authority of [sections 744b and 744c of Title 18]; and in addition thereto each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed, under the same terms and conditions as provided in [sections 710–712a] a deduction from his sentence of not to exceed three days for each month of actual employment in said industry or said camp for the first year or any part thereof, and for any succeeding year or any part thereof not to exceed five days for each month of actual employment in said industry or said camp.

Section 4 of the Act of June 29, 1932, 47 Stat. 381 (18 U. S. C. 716b), provides:

> Sec. 4. Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence: *Provided,* That this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

The Act of June 25, 1910, 36 Stat. 821, as amended (18 U. S. C. 717, 719 and 723), provides in pertinent part:

* * * * *

SEC. 4. If the warden of the prison or penitentiary[1] from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner.

* * * * *

SEC. 6. When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner

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[1] Section 3 of the Act of May 13, 1930, 46 Stat. 272, as amended by the Act of June 29, 1940, 54 Stat. 692, 18 U. S. C. 723c, vested in the Board of Parole and its members exclusive authority to issue retaking warrants. That section reads in part as follows:

"The said Board, or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. * * *"

was out on parole shall not be taken into account to diminish the time for which he was sentenced.

* * * * *

SEC. 10. Nothing in [Section 714–716, 717–722 of Title 18] shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by law.

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